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IN THE

Supreme Court of the United States

October Term, 1984

THE STATE OF FLORIDA

Petitioner,

vs.

SILVIO P. ZAFRA,

Respondent.

On Petition for a Writ of Certiorari to the Florida Third District Court of Appeal

BRIEF OF PETITIONER ON JURISDICTION

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QUESTION PRESENTED

FIRST ISSUE

WHETHER THE DECISION OF THE FLORIDA COURT, LIMITING THE AUTHORITY OF THE UNITED STATES CONGRESS, CONSTRUING THE UNITED STATES CONSTITUTION AND HOLDING THAT UNDER 19 U.S.C. §1581(a) UNITED STATES CUSTOMS OFFICERS MAY NOT BOARD A VESSEL IN CUSTOMS WATERS FOR A ROUTINE DOCUMENT EXAMINATION WITHOUT REASONABLE SUSPICION IF THE CUSTOMS OFFICERS ARE ALSO LOOKING FOR DRUGS, IS IN DIRECT CONFLICT WITH AND IS A PLAINLY ERRONEOUS CONSTRUCTION OF UNITED STATES V. VILLAMONTE-MARQUEZ, ___U.S.___, 103 S.Ct. 2573 (1983)?

SECOND ISSUE

WHEN CUSTOMS OFFICERS APPROACH TO INSPECT A VESSEL AND ITS CONTENTS UNDER UNITED STATES V. VILLAMONTE-MARQUEZ, AND 19 U.S.C. 1581(a) AND 21 U.S.C. §955 MAY THE DEFENDANT DEFEAT THE CUSTOMS OFFICER'S LAWFUL AUTHORITY BY QUICKLY REMOVING HIS BOAT FROM CUSTOMS WATERS AND PUTTING IT ON A LAND BASED TRAILER?

QUESTIONS PRESENTED
(continued)

THIRD ISSUE

WHETHER THE STATE COURT'S REJECTION OF THE CUSTOMS DRUG SMUGGLER PROFILE PRESENTATION AND REASONABLE SUSPICION ANALYSIS UNDER THE UNITED STATES CONSTITUTION IS IN DIRECT CONFLICT WITH FLORIDA V. ROYER, ___ U.S. ___, 103 S.Ct. 1319 (1983); UNITED STATES V. MENDENHALL, 446 U.S. 544 (1980) AND UNITED STATES V. CORTEZ, 449 U.S. 411 (1981)?

FOURTH ISSUE

WHETHER THE EXCLUSIONARY RULE SHOULD BE APPLIED TO NON-EGREGIOUS POLICE CONDUCT?

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PREFACE

The Petitioner, THE STATE OF FLORIDA, was the Petitioner in the Supreme Court of Florida; the Appellant in the District Court of Appeal of Florida, Third District and the prosecution in the Florida trial court. The Respondent, SILVIO P. ZAFRA, was the Respondent in the Supreme Court of Florida; the Appellee in the District Court and the Defendant in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following reference is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this court, which are contained in the Petitioner's Appendix attached hereto and consist of pages A1-A74.

I.

OPINIONS BELOW

The opinion of the District Court of Florida, Third District upon remand from this Court is reported at State v. Zafra, 444 So.2d 1064 (Fla. 3d DCA 1984). (A59-A63). The original opinion of the Florida District Court affirming the granting of the Defendant's Motion to Suppress is reported at State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982). The opinion of the Florida Supreme Court denying the State's Application for review, is contained in the Petitioner's Appendix at "A73" and will be reported by the West Publishing Company. The West Publishing Company citation is the official reporter for citation to these opinions.

II.

JURISDICTION

On October 18, 1984, the Supreme Court of Florida denied the State's timely application for review. A73. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257(3); Title 19, United States Code §1581(a); and Amedments IV and XIV of the United States Constitution.

The interpretation of the Florida Constitution and the United States Constitution are identical for purposes of the application of the criminal law and search and seizure issues. See, Art. I, §12 Fla. Const.; see, also, Hetland v. State, 366 So.2d 831 (FLa. 2d DCA 1979) approved and adopted, Hetland v. State, 387 So.2d 963 (Fla. 1980).

III.

CONSTITUTION AND STATUTORY PROVISIONS

Amendment IV of the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the Constitution of the United States provided that:

> "All persons born naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 19 United States Code §1581(a)

provides specifically that:

> "Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the custom waters or, as he may be authorized, within a customs enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within its district, and examine the manifest and other documents and papers and examine, any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

Title 21 United States Code §955 Provides

inter alia, that it is:

> "unlawful for any person to bring or possess on board any vessel. . . arriving in or departing from the United States or the customs terri-tory of the United States, a controlled substance. . ."

Article I Section 12 of the Florida

Constitution provides that:

> "Searches and seizures.--The right of the people to be secure in their persons, houses papers, and effects

against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution."

IV.

STATEMENT OF THE CASE

The Defendant, Silvio P. Zafra, was charged by information with three counts consisting of one count of possession; one count of importation and one count of trafficking in marijuana, arising out of his attempt on October 10, 1980 to bring ashore one thousand (1000) pounds of marijuana in a twenty-five (25) foot speedboat at Crandon Park, Key Biscayne, Miami, Florida. The Defendant filed a motion to suppress, which the Florida trial court granted after a hearing.

At the hearing below the State produced three witnesses, United States Customs Officers Ogden, Carlin and Nasossis. The Defendant did not testify and produced no witnesses or evidence. United States Customs Officer Richard Ogden said that he had been trained by the Customs Service to intercept

contraband coming into the United States by plane and boat. A5. On October 10, 1980 he went on duty at six p.m. and began a routine survey of boats in the Crandon boat ramp area. A6-A10.

The customs officers at 3:00 a.m. encountered the Defendant's boat in customs waters. A11. It was undisputed below that the customs officer thereupon decided to conduct a routine customs boarding. A16 . Officer Nassosis checked the boat's papers. A44. Officer Ogden stepped on the trailer fender and looked into the boat. A16. The deck was much higher than the manufacturer had put in. A16. Ogden said that this was a characteristic profile of smugglers. A16. The trend among smugglers had evolved from throwing contraband into cabins, to stowing contraband into cabins, to stowing contraband in hidden compartments. A17. Ogden testified that

he observed marijuana residue on the boat carpet. A18. There was also a rise in the carpet evidently covering a hatch area. A18. Ogden testified that he considered this suspicious--the way the vessel was constructed there should not have been a hatch of that nature under the carpet tacked to the deck. A19. The boat had no fishing gear and had only tools and mechanics tools on the deck. A20. Ogden said he pulled the carpet back and an odor of marijuana was coming out. A22. The hatch was secured by screws. A22. In the hatch were twelve (12) bales of marijuana weighing one thousand pounds. A24.

Relative to the present petition, as noted above, the State's evidence was undisputed. In particular, United States Customs Officer, James A. Carlin

explained the presence of the United States Customs Officers at the Crandon Park boat ramps thus:

"[By the prosecutor]:

Q Turning your attention to October 10, 1980, had you started work that day or before?

A We started on the 9th at 6:00 p.m.

Q When you say, "we" to whom are referring?

A Myself, Officer Nasossis and Officer Ogden.

Q What was your duty for that period which you were working?

A We're assigned to the marine section on the night shift. So, basically we check boat ramps for any incoming vessels--the various boat ramps into the Miami area.

A What is the purpose of checking the boat ramps for the waterways? What is the relationship to Customs?

A Well, we check basically for boats coming from foreign countries.

> Boats coming into those ramps do have access to Custom waters. So, we check for documents and any undeclared items they might have."

A38-A39.

Based upon the foregoing and rejecting the State's argument based upon other factors that there was articulable suspicion, the trial court granted the Defendant's Motion to Suppress. See, State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982), rev. den., 418 So.2d 1281 (Fla. 1982). On appeal to the Florida District Court of Appeal, the District Court affirmed the trial court holding that there was no articulable suspicion herein and that United States Custom Officers could not board any vessel to check papers unless they could show a "border crossing" or unreasonable suspicion. Id.

The undersigned filed his petition

for certiorari from said decision contemporaneously with the Government's petition in United States v. Villamonte-Marquez, ___U.S.___, 103 S.Ct. 2573 (1983). In Villamonte-Marquez, this Court subsequently held that Customs Officers may lawfully board any vessel in customs waters to examine documents under 19 U.S.C. §1581(a) without articulable or reasonable suspicion. Id. On June 27, 1983, this Court therefore granted Certiorari, vacated the foregoing decision of the Florida District Court and remanded for further proceedings consistent with United States v. Villamonte-Marquez. Florida v. Zafra, ___U.S.___ 103 S.Ct. 3259 (1983).

On remand, the Florida Third District Court of Appeal permitted supplemental briefs on the effects of Villamonte-Marquez and permitted further

oral argument. See, A58. On January 24, 1984, the Third District Court again affirmed the suppression and dismissal by the trial court. State v. Zafra, 444 So.2d at 1064-1065; see, A59-A63. The District Court reasoned that United States v. Villamonte-Marquez was inapplicable because the Defendants had quickly taken their boat out to the water and (and it was no longer a boat?!?) and the Customs Officers were more interested in looking for narcotics than solely checking documents. Id. The Court also stated that the State had "conceded" that there was no articulable suspicion in the present cause[1].

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[1]·The Court's analysis that the State "conceded that there is no articulable suspicion herein is based solely upon the wording of the Court's original opinion in State v. Zafra, 408 So.2d 746. However, as reflected in the excerpt to the State's original brief on appeal, it states:

On February 8, 1984, the undersigned filed a vigorous Motion for Rehearing which was denied on February 29, 1984. See, A64-A70. On October 18, 1984, the Supreme Court of Florida denied review, with the Chief Justice Boyd and Justice Ehrlich dissenting [2]. See, A73. The Florida District Court however stayed its mandate pending review in this Court. See, A74; see, also, A71-A72.

(Footnote 1 continued)

> "Furthermore, the State would note that the officers did indeed have reasonable suspicion, based upon their observations, to board the vessel."
>
> Brief of State, at p.14.
>
> (see A54)

[2]. The fact that the Supreme Court of Florida may have severely limited jurisdiction to review this matter under Florida's recent constitutional amendment, see, Jenkins v. State, 385 So.2d 1356 (Fla. 1980), should not affect the proper exercise of this Court's jurisdiction. But see, Florida v. Rodriguez, ___ U.S. ___, 105 S.Ct. 308 (1984)(dissenting opinion).

V.

REASONS FOR GRANTING THE PETITION

A. Direct Conflict With United States v. Villamonte-Marquez.

Without conceding for a moment that it was in error in its original opinion, the Florida District Court again affirmed the judgment of the trial court below dismissing the present criminal charges upon the Defendant's Motion to Suppress. Rejecting United States v. Villamonte-Marquez, 462 U.S.___, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983), permitting customs officers to board any vessel under Section 19 U.S.C. §1581(a), the Court reasoned that the evidence herein should be suppressed because the officers intended to look for illicit narcotics rather than solely engaging in a routine customs inspection. 444 So.2d at 1064-1065. (A59-A63).

The District Court's analysis that the customs officers in the case at bar had no authority to conduct the present search because the officers were also looking for narcotics, is in square conflict with the plain rejection of that theory in United States v. Villamonte-Marquez, 103 S.Ct. at 2577, note 3 wherein this Court clearly explains, thus:

> "There is no issue in this case concerning the activities of the officers once they boarded the Henry Morgan II. The only question presented to this Court concerns the validity of the suspicionless boarding of the vessel for a document inspection.
>
> Respondents, however, contend in the alternative that because the customs officers were accompanyed by Louisiana State Policemen, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marijuana, they may not rely on the statute authorizing boarding for inspection of the vessel's documentation. This line of reasoning was rejected in a similar situation in Scott v. United States, 436 U.S.

> 128, 135-139, 98 S.Ct. 1717, 1722-1724, 56 L.Ed.2d 168 (1978), and we again reject it. Acceptance of respondent's argument would lead to the incongruous result criticized by Judge Campbell in his opinion in United States v. Arra, 630 F.2d 836, 846 (C A1 1980): 'We would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers.'"

The undersigned brought the foregoing footnote 3 to the attention of the District Court to no avail. See, A68.

Furthermore, the District Court's central position that the Customs Officers intended to board the boat because they suspected that it was carrying narcotics rather than boarding the boat to check "custom papers" is wholly contradicted by the record. The undisputed evidence from the only witnesses presented established that Officer Nasossis checked the boats papers, A44,

and that the officers boarded the boat because they decided to conduct a routine customs boarding. A16. As Customs Officer Carlin testified:

> "We informed the--well, I had what we call a Customs Raid jacket. It's a nylon windbreaker with the Customs badge, you know, embossed o it, and on the back it says, 'U.S. Customs' I think in two inch lettering. It has a Customs patch on each sleeve.
>
> So, they more or less knew who we were, but we identified ourselves with our badge holder in the case and told them we were from U.S. Customs and that we would like to inspect their vessel and check their documents on the vessel.
>
> Q What happened next?
>
> A I believe Mr. Zafra identified himself as the master of the vessel and he was asked for documents, I think, by--I believe Officer Nasossis who asked him for his documents in English, and I think I also asked him in Spanish, you know, to further clarify what we wanted."

A43-A44.

The present District Court opinion is

therefore a plain miscontruction of Villamonte and the express authority of 19 U.S.C. 1581(a) and 21 U.S.C. §955, which provides that it is:

> "unlawful for any person to bring or possess on board any vessel. . . arriving in or departing from the United States or the customs territory of the United States, a controlled substance. . ." [Emphasis added].

The present decision emasculates 19 U.S.C. 1581(a) and 21 U.S.C. §955 and makes a mockery of this Court's express consideration of the present issue and rejection of the District Court's analysis. The decision is also in direct conflict with the Eleventh Circuit Court of Appeals on the same issue. See, United States v. Albano, 722 F.2d 690, at 695 (11th Cir. 1984)("Customs officers may rely on section 1581(a) even though they may suspect the vessel of smuggling contraband"). In sum, the Florida Third

District Court of Appeal has told the United States Congress that it cannot do in Florida that which the face of 19 U.S.C. §1581(a) clearly states Congress intended to do: to give customs officers authority in "customs waters" to board vessels for document and customs examination, irrespective of whether they are also looking for contraband, which is expressly authorized under the companion section, 21 U.S.C. §955 in any event. This decision comes from the most active Court in Florida in search and seizure and boat cases because of its very proximity to the major sources of illicit marijuana and cocaine. See, e.g., Hanson v. State, 445 So.2d 378 (Fla. 3d DCA 1984)(citing State v. Zafra); State v. Doyle, 409 So.2d 1168 (Fla. 3d DCA 1982); Morales v. State, 407 So.2d 321 (Fla. 3d DCA 1981). At the same time, the present decision comes at a time when a major

federal and state strike force is operating in Florida to combat the grave problem of the narcotics traffick corridor through Florida, the State with the nation's largest coastline. See, "Select Committee on Narcotics Abuse and Control, 95th Cong. 2d Sess., Report on Problems of Law Enforcement and Its Effort to Reduce the Level of Drug Trafficking in South Florida" (Comm. Print 1978). The plainly erroneous decision of the District Court is therefore not only important to Florida, but is also of immediate, critical importance to federal law enforcement authority and to the security and safety of all citizens in virtually all states in this nation where drug trafficking is a problem. Additionally, the bizarre conflict which now exists between the highest federal court, see, e.g., United States v. Albano, supra, and the controlling state

court in the same jurisdiction can only be resolved by this Court. Indeed, the State submits that the present District Court has been difficult in its views on search and seizure[3]. See, Florida v. Rodriguez, ___U.S.___, 105 S.Ct. 308 (1984)(reversing the same Florida Third District Court of Appeals for the second time in the same case in as many years). The State has therefore no recourse but to respectfully request this Court's patient consideration again.

B. Conflict with Other Decisions of the United States Supreme Court.

Similarly, the District's Court's reasoning that it makes a constitutional

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[3]. It is for this reason that the sua sponte modification of the Eleventh Circuit's opinion in United States v. Herrera, 711 F.2d 1546 (11th Cir. 1984), See, 727 F.2d 1016 11th Cir. 1984), has had and will have no effect whatsoever upon the present opinion.

difference that the present vessel was quickly removed from the water, is absolutely contrary to the constitutional analysis in this Court's "fresh pursuit" and "authority to search" cases. See, e.g., United States v. Santana, 427 U.S. 38 (1975)(Defendant's flight into her home does not vitiate law enforcement officers authority to detain her acquired prior to her flight); Warden v. Haden, 387 U.S. 294 (1967)(same); Illinois v. Andreas, ___U.S. ___, 103 S.Ct. 3319 (1983) (Authority to search container acquired at an earlier point in time carried through and attach to the time the container was again subsequently opened); Illinois v. Lafayette, ___U.S.___, 103 S.Ct. 2605 (1983)(search pursuant to lawful arrest attaches at the time of arrest and is still valid even though conducted later at station); United

States v. Ross, ___U.S.___, 102 S.Ct. 2157 (1982)(Authority to search container acquired at an earlier point in time carried through and attaches to the time the container was again subsequently opened); Illinois v. Lafayatte, ___U.S. ___, 103 S.Ct. 2605 (1983)(search pursuant to lawful arrest attaches at the time of arrest and is still valid even thought conducted later at station house). The singular rule of the foregoing decisions is that a change in position by the defendant or the thing to be searched from the position in which the officer acquired the authority to lawfully search, is not constitutionally significant. A fortiori, the fact that a defendant or

defendants may be very clever and quick about removing their boat from the water does not defeat the right of customs officers to demand papers and search for narcotics. See, United States v. Ross; Illinois v. Lafayette; Illinois v. Andreas, supra. The opinion of the District Court is in direct conflict with these decisions and the Court has therefore completely misapplied and misconstrued the federal constitution. See, Art. I, §12 Fla. Const.

Furthermore, the State would assert that the federal officers did indeed have reasonable suspicion, based upon both their experience with smugglers and their observations, to board the vessel. See, Florida v. Royer, ___U.S.___, 103 S.Ct. 1319 (1983); United States v. Cortez, 449 U.S. 411 (1981); see, also, United States

v. Mendenhall, 446 U.S. 544, (1980) (approving use of profile characterics); United States v. Forbicetta, 484 F.2d 645, 646 (5th Cir. 1973)(approving use of "profile" characteristics at border search). In Cortez, the Court repeated its approval of an officer's use of his experience for probable cause and articulable suspicion thus:

> "The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information form police reports, if such are aailable, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these date, a trained officer draws inferences and makes deductions--inferences and deductions that might well elude an untrained perrson." [Emphasis added].
>
> 449 U.S. at 418.

Additionally, after the officers were on the vessel, they certainly acquired probable cause to search the hold from the presence and smell of marijuana on the deck. When the officers so clearly had probable cause to search the hold, the warrantless search was obviously justified by the exigency exception for vehicles and boats. See, United States v. Ross, ___U.S.___, 102 S.Ct. 2157 (1982); Carroll v. United States, 267 U.S. 132 (1925); See also, Chambers v. Maroney, 399 U.S. 42 (1970).

The Florida District Court's flat rejection of the State's argument upon articulable suspicion which was based upon the customs "profile" and the observations, training and experience of the officers, is patently erroneous in the face of the correct constitutional analysis in Royer, Mendenhall, and

Cortez. The fact that the events transpired in the proximity of a border is also a fact, which the Florida courts erroneously absolutely refused to credit. See, Cortez. The Florida District Court's erroneous analysis of "profiles" reasonable suspicion and "boat" law is an extension of the same erroneous analysis in Florida v. Rodriguez. See, also, Florida v. Royer, 460 U.S.____ (1983).

Finally, the State submits that the cause herein is in direct contravention to the good faith analysis of this Court in Michigan v. DeFillippo, 443 U.S. 31 (1979) where despite the unconstitutional nature of the statute this Court nevertheless sustained the seizure where the officers were relying in good faith upon the statute and its validity. The federal officers herein were relying upon

19 U.S.C. §1581(a) and that, which the statute plainly says the officers can do: board any vessels in customs waters for document and customs inspection. For Florida and all federal customs officers in state court, the present ruling squarely conflicts with Michigan v. DeFillippo. Moreover, the officers' good faith reliance upon their observations, training and experience to conclude that a detention was necessary, presents a circumstance herein of plainly non-egregious police conduct, to which the harsh penalty of the exclusionary rule should find no application. See, California v. Mingares, 443 U.S. 916 (1981)(Rehnquist, J. and Burger, J., dissenting); Stone v. Powell, 428 U.S. 465, at 496-502 (1976)(Burger, J., concurring); Id, at 537-542 (White, J., dissenting); Brewer v. Williams, 430 U.S.

419, at 420-429 (1977)(Burger, J. dissenting); Brown v. Illinois, 422 U.S. 590, at 610-612 (Powell, J. concurring); United States v. Williams, 622 F.2d 830 (5th Cir. 1980)(en banc), cert. den., 449 U.S. 1127 (1981).

VII

CONCLUSION

The present opinion is in direct conflict with United States v. Villamonte-Marquez and another decision in the same jurisdiction of the Eleventh Circuit Court of Appeals upon an important issue of federal law regarding the authority of federal officers. The District Court has refused to follow federal law and the paramount federal interest in maintaining the integrity of the borders and "customs waters" of the United States. At the same time, this present decision of the Florida Third District Court is binding on all Florida trial courts see, State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976), and emanates from the leading Florida state court in the construction and analysis of "boat" law and drug courier case law.

Florida has the greatest coastline of any state and a grave interest in the consistent interpretation of "boat law." The present decision's direct adverse effect upon a national federal and state effort in Florida to stem the tide of drug traffic in Florida cannot be gainsaid. The inconsistent and erroneous analysis of the Florida District Court presents a conflict on a matter of substantial public and national importance. The present cause presents a most cogent and timely case on the question of federal officer's authority under 21 U.S.C. §955 requiring customs officers to seize contraband, consistent with their primary statutory authority.

This Court therefore plainly has jurisdiction herein and should exercise

exercise its jurisdiction for these, "special and important reasons." See, Sup. Ct. R.17.

RESPECTFULLY SUBMITTED on this ____ day of December, 1984, at Tallahassee, Leon County, Florida.

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APPENDIX

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IN THE CIRCUIT COURT
OF THE ELEVENTH
JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY,
FLORIDA
CRIMINAL DIVISION

THE STATE OF FLORIDA)
Plaintiff,)
vs.) No. 80-19386
SILVIO ZAFRA,)
Defendant,)
- - - - - - - - - - - -)

Metropolitan Justice
Building,
Miami, Florida
Friday, 9:00 a.m.,
February 20, 1981.

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The above-entitled case came on for motions before The Honorable James R. Jorgenson, Circuit Judge, pursuant to Notice.

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APPEARANCES:

JANET RENO, State Attorney, by
ELYSE TARG, Assistant State
Attorney.
Attorney for Plaintiff.

ROSEN, PORTELA, BRONIS, ANGUEIRA,
& CLAY, by WILLIAM A. CLAY, Esq.
of counsel.
Attorneys for Defendant.

[PREHEARING DISCUSSION OF ATTORNEYS OMITTED]

RICHARD D. OGDEN was called as a witness and, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. TARG:

Q Would you please state your name and official capacity for the record.

A Richard D. Ogden. I am a patrol officer for the United States Customs Service.

Q How long have you been so employed as a Customs Patrol Officer?

A For approximately eighteen months.

Q Pursuant to that job, did you have any training?

A Yes, ma'am, I did.

Q What training was that?

A I attended a seven-week integrated law enforcement course of the Federal Enforcement Center in Glencoe, Georgia. In addition, I attended a four and a half week course at the same location, which dealt with specific duties assigned to Customs Patrol Officers.

Q Officer, what are the duties of a Customs Patrol Officer--and, for the record, I will use a CPO.

What are the duties of a CPO?

A To intercept the flow of contraband coming into the United States, primarily narcotics, and to enforce other customs and related laws.

Q Are your powers basically dealing with boats, airplanes or what?

A Yes, ma'am.

A high percentage of our work deals with boats and aircraft coming into the country.

Q Were you employed on August 10, 1980?

A Yes, ma'am.

Q Were you employed as a CPO then?

A Yes, ma'am.

Q Did you come on to duty that day?

A I came--reported for duty at 6:00 p.m. on October 9.

Q What were you going to do that night?

A Generally that night we conducted a routine survey--myself and my partners --of the public boat ramps situated in the local Miami area going from Key Biscayne up to Bakers Haulover and making an analysis on the different types of trucks and boat trailers parked at these locations.

Q How many boat ramps did you investigate that night, approximately?

A Approximately eight.

Q At any of these ramps did you notice anything unusual or was anything brought to your attention?

A Yes, ma'am.

Q What was that?

A At Crandon Boat Ramp, I would estimate at approximately eight to nine p.m. that evening, we observed two pick-up trucks with trailers attached which attracted our attention.

Q Why did they attract your attention?

A Based on my prior experience as well as the documented experience of all the other officers in our office, this particular trailer, which was a three axle float on, fit somewhat of a profile commonly used in smuggling activities.

Q Why did this seem suspicious? What was it about this type of trailer

which seemed suspicious?

A That this particular type of trailer has the capability of carrying a very large vessel as opposed to what would be used just for fishing around the bay.

The vessel generally carried on this type of trailer has long range capabilities and they are generally very wide vessels.

Q Have you ever made any seizures involving these typical-type trailers?

A Yes, ma'am.

Q Approximately how many?

A I would estimate approximately twelve to fifteen.

Q When you have made these types of seizures, have you found contraband, drugs and the like?

A Yes, ma'am.

Q Do you know of any other seizures

made of these types of trailers involving contraband?

A Yes, ma'am.

Q How many, approximately?

A Throughout our office I would say there has been several dozen made, or more, in the eighteen months I have been employed there.

Q Officer, you stated that you saw that first at eight o'clock.

What did you do after you noticed it?

A We first observed it at approximately eight o'clock that evening. It was the only truck and trailer at the local ramps which had any potential as far as we were concerned.

We established a surveillance on the truck and trailer at the Crandon boat ramp.

Q Did you sit on it? Did you watch it all night or did you do anything during that time?

A To the best of my recollection, we did not sit on the truck and trailer immediately after we spotted it.

We more or less made a note on it, checked the other ramps and then came back.

Q When was the next time you saw this particular trailer?

A I would imagine about an hour and a half, maybe two hours after we first observed it, we came back to it.

That's just a rough estimate.

Q Did you see anything at that time?

A No, ma'am.

It was in the exact position and place as we had left it.

Q What did you do then?

A At that time we established a surveillance on the truck and trailer, parked our vehicle somewhat in a darkened area of the parking lot and just sat and waited.

Q Did you see anyone approach that trailer later on, either that night or the next morning?

A Yes, ma'am.

Q Approximately when was the next time you saw somebody approach that trailer?

A The first and only time we saw someone approach that trailer was when one of two persons boarded the 25 foot Bertram, which arrived at Crandon Marina.

Q What time was that, approximately?

A I believe that was a little after three o'clock in the morning.

Q Was that on October 10?

A Yes, ma'am.

Q Was the length of time between which you had first seen it and the fact that it was three o'clock--did that affect you in any way?

[OBJECTION OVERRULED].

A Yes, ma'am.

Q How so?

A From the time we first spotted the truck and trailer until the time someone approached it, it was nearly seven hours.

That, to me, aroused my suspicions in that it would have been an unusually long fishing trip, in my opinion.

Q Would it have any other influence on you, as to the length of time?

A Yes, ma'am.

We have made notes in our office and calculated on several occasions that it generally takes vessels approximately four and a half to five hours to go from here to any of the islands in the Bimini area and to return. This affected my thinking in that they had more than sufficient time to go to any of the islands, which could be used as a stash site--and there are intelligence

bulletins that we have which indicate that that is a common method--store the marijuana on a vessel and return.

Q Did you have occasion to see anybody on the boat?

A Yes, ma'am.

Q Who was that?

A The defendant, Mr. Siovio Zafra, and one other individual.

Q Did anything about those two people arouse your suspicions?

A When we first initially spotted the vessel arriving at the dock, I really could not see them all that well. We did notice that there were two persons, as they brought the boat out of the water and, as we approached, there were several things which caught my attention.

Q What was that?

A First of all, it was quite evident right off, once I got close enough, that

both of the individuals were Latin.

Q Was there anything suspicious about that?

A Not suspicious. Only in that we do make a lot of arrests and seizures with boats loaded with marijuana which are manned by two or usually two or three Latin males.

Very rarely, in fact never, have I participated in one that I recall with a woman on board or children or where both individuals were Americans.

Q What about blacks--have you ever made a seizure where there are blacks?

A I believe perhaps on one occasion.

Q In terms of the experience of Customs Officers with which you are familiar, do you know what percentage of their seizures are made in cases where there are Latin males?

[OBJECTION SUSTAINED]

[DISCUSSION OMITTED].

Q Officer Ogden, was there anything else about the appearance of these two Latin males which you found to be suspicious?

A Yes, ma'am.

Q What was that?

A On the initial glance at the two individuals they appeared to be somewhat--excuse the term--weatherbeaten. They looked like they had been out for some time engaging in perhaps heavy work or something.

Their clothes were somewhat dirty. They just looked like they had really been worked over.

Q Did there come a time when you stopped the two individuals?

A Yes, ma'am.

Q When was that?

A A few minutes after we first stopped the boat coming up to the dock.

Q What was the purpose of the stop?

A The purpose of the stop was to conduct a routine Customs boarding.

Q Pursuant to that, what did you do?

A My two partners went up to talk to the individuals and to obtain the necessary registration forms. I went to the vessel, which was already aboard the three axle float-on trailer and had already been pulled out of the water. I stepped on the fender above the wheels of the trailer and looked over the gunwale of the vessel into the boat.

Q At that time did you notice anything unusual about that boat?

A Yes, ma'am.

Q What was that?

A I noticed that the main deck of the vessel was considerably higher than what I would believe the manufacturer would have put it. This is also a profile

which has become quite common among smugglers.

The trends have changed over the years. They have gone from just throwing it into the cabin and loading it in remote spots along the coast to using secret compartments and bringing it on to the public boat ramps.

Q Have you ever encountered boats like this in your experience?

A Yes.

Q Have you encountered contraband in these boats?

A Yes, ma'am.

Q How many seizures have you made in boats of this type?

A I would say approximately maybe fifteen.

Q What did you do next?

A I climbed aboard the vessel, took a quick glance into the cabin area to

assure myself that there was no other persons on board the cabin, and it was more or less a visual--just a quick visual check.

I looked down at the deck and got down on my hands and knees where I could get a closer look at it.

I had one flashlight and I did observe marijuana residue embedded in the carpet.

You could not see it until you got down on your hands and knees and looked really close and spread the pieces of carpet, you know, apart.

Q Did you find anything else?

A Yes, ma'am.

Prior to finding the residue, I did run my hand over the carpet itself in an effort to determine if I could feel anything underneath and I did feel what appeared to be a small rise underneath the carpet.

Due to its shape and size it led me to believe that there was a hatch underneath the carpet.

Q This was covered by the carpet though?

A That is correct.

Q In your experience, was that suspicious?

A Yes, ma'am, it was.

Q Why?

A Because, the way the vessel was constructed, there shouldn't have been a hatch of that nature under carpet tacked down to the deck.

Q Was there anything else about what you saw on the deck of that boat which made you suspicious?

A Yes, ma'am. There were several tools and a lot of odds and ends on the deck that really had nothing to do with any fishing expedition, as far as I could

tell--the tool boxes, odds and ends, mechanics' tools and things that I, ordinarily, would not expect to see on a boat, especially for a fishing expedition.

To the best of my recollection, there was no fishing gear on board the boat. I believe there might have been an ice chest, but I didn't see any fish nor did I see any bait.

Certainly anyone engaging in a fishing trip for six or seven hours would, in my opinion, at least come back with something.

Q What led you to believe that these people might have been on a fishing trip?

You said that anyone on a fishing trip would have had something there.

What led you to believe that they might have been on a fishing trip?

A Generally--it was just an assumption on my part at that point that they were.

Generally, when we stop boats and ask the routine questions, they generally are fishing or they're taking the boat out for a test run to test it out.

Q In your experience, when you find this residue on the ground what do you usually find?

A Usually when we find residue, in my experience, we'll either find a stash of marijuana on the vessel or we'll find a secret compartment which has other residue in it which is an indication that perhaps at one time or another it did carry marijuana.

Q What did you do after you have gotten down on your hands and knees?

A After I had gotten on my hands and knees and picked up a little residue and saw the incongruency in the deck below the carpet, I asked my partner, Richard Nasossis, to come aboard the vessel and give me a hand.

Q Did he?

A Yes, ma'am, he did.

Q What happened then"

A I told him what I had found and he agreed that there was definitely something amiss.

We pilled back the carpet off the deck, wnich was--it was just lightly tacked down with a little adhesive, and he put his nose---

We did find a hatch. It was basically rectangular in shape and secured by probably a dozen or more screws.

He got down on his hands and knees and put his nose to one of the seams in the hatch and took a whiff and came up and said yeah--he could smell what he thought was marijuana.

Q What did you do then?

A We proceeded to remove the screws from the hatch and lifted the hatch and

the marijuana was visible--immediately visible--below the deck.

Q Have you seen marijuana before?

A Yes, ma'am.

Q To your trained eyes, this was marijuana?

A Yes, ma'am.

Q Did you run any test on it?

A Yes, ma'am, we did run a field test.

Q What did you do?

A We have a small test tube filled with a chemical agent which, when exposed to THC, which is in marijuana and hashish, will turn bright red.

We removed a few leaves. I tore open one of the bales and removed a few leaves and a couple of seeds, put them in the tube, mixed it with the chemical, shook it up, and it tested positive and turned bright red.

Q How much marijuana was there?

A We found twelve bales and we estimated the weight to be approximately 1000 pounds.

These were somewhat large bales.

Q Did all of this take place in Dade County, Florida?

A Yes, ma'am.

MS. TARG: The State has no further questions of this witness.

THE COURT: You may inquire.

CROSS EXAMINATION

BY MR. CLAY:

Q Officer Ogden, is it not true that you and the other two Customs Patrol Officers with you on the day and night and morning in question were together throughout all of your law enforcement activities?

A That's correct.

Q Is it not also true that enforcement

of the laws of the State of Florida is not within the scope of your authority?

[OBJECTION OVERRULED].

A If we come across violations of Florida law in our efforts, then we do make detentions as necessary and turn them over to the local authorities.

Q That would be incidental to your investigating a federal customs violation?

A That's correct.

Q But you would not be conducting a search for violations of Florida law, would you?

A No, sir, we wouldn't.

Q Is it not true that you and the other two Customs Patrol Officers, while you were still in the surveillance van, made the decision that you were going to board this particular boat?

A That's correct.

A That's correct.

Q Is it not true that the van in which you were located and from which you were making some observations was approximately 100 yards from the boat, the trailer and the truck, which you have been describing?

A Approximately, give or take a few yards.

Q After making the decision in the van to approach these men and board the boat, I assume all three of you officers got out of the van and commenced to do what you had planned to do?

A That's correct.

Q Your primary role was to climb up on the trailer and climb up on the boat and get inside the cockpit of the boat, was it not?

A I wanted to take a look in the cabin area to assure myself there were no other

persons there.

Q But you went directly to the trailer and to the boat?

A Went directly to the trailer and stood up and looked in the boat.

Q While you were doing that, the other two Customs Patrol Officers were involved in some other activity?

A That's correct.

Q Is it not true that Customs Patrol Officer Carlin was suffering from a back injury, specifically a slipped disc, and he lagged a little bit behind?

A That's correct.

Q You have been testifying regarding three axle trailers and some type of a profile associated with it.

Is it not true that three axle trailers or four axle trailers are just as consistent with being used by innocent boat owners who happen to have

large boats that necessitate that type of trailer equipment? Is that not true?

A Yes, sir.

Q There is nothing uniquely specific about three wheel or three axle or four axle trailers which inevitably point to involvement in drug smuggling, is there?

A They dictate a strong possibility in our opinions, but it's possible that they're--I'm sure that they're used by innocent persons.

Q Would you not agree that probably there are more three and four axle boat trailers used innocently--than pursuant to a criminal venture?

[OBJECTION OVERRULED].

A I would say that a large percentage of them are probably innocent.

That's hard to say.

Q Sir, are you saying that you and the other Customs Patrol Officers first

observed the truck and trailer in question in this case at 8:00 p.m. on the night in question?

A Or thereabouts--eight or nine o'clock.

Q That would essentially be the first involvement of you and the other officers in this case, would it not?

A That would be the first time we sighted it--right--and made a note of it.

Q Did I understand you to say that it is your experience that the typical or customary time it takes a vessel to travel from, let us say, Crandon Marina to the Bimini area and return in four to five hours?

A Approximately four and a half to five hours.

Q When you made your observations of this vessel, you had absolutely no idea what kind of engine it had in it, did you?

A No, sir, I didn't.

Q You did not know whether it would be a diesel engine that might be capable of producing approximately a forward speed of eight to ten knots, or some type of high speed engine. Correct?

A That's correct.

Q Obviously the time it would take to go from Miami to Bimini and return would be completely dependent upon the kind of engine a particular boat has. Correct?

A The kind and the fuel capacity, right.

Q You had no knowledge of any of those factors?

A No, sir, I didn't.

Q Did I understand you to say that you and the other officers were traveling around Dade County and checking out various boat ramps and marinas?

A We checked a total of about eight

ramps ranging from the Crandon boat ramp, Key Biscayne, to the public boat ramp at Bakers Haulover.

Q You have testified regarding the appearance of Mr. Zafra and the other individual as weatherbeaten and having dirty clothes.

A That's correct.

Q Do you recall testifying in a deposition on January 30, 1981, in this case?

A Right.

Q You were under oath, of course?

A Right.

Q Is it not true that you made absolutely no mention of the alleged appearance of these men as being weatherbeaten and wearing dirty clothes?

[OBJECTION SUSTAINED].

Q Did you prepare a report in this particular case?

A I did not. No, sir.

Q Do you own a Bertram boat yourself?

A No, sir, I don't.

Q Do you own any boat?

A No, sir, I don't.

Q Have you ever owned a Bertram?

A No, sir.

Q You have you ever been on one?

A Yes, sir.

Q How many times?

A Half a dozen.

We have one at work.

Q This particular Bertram boat in this case is an older Bertram, is it not?

A Yes, sir, I believe it is.

I think it's a 1975 or something.

Q You know enough about boats that they were constructed in a heavily built fashion a few years back than they are today, do you not?

A Right.

Q Correct?

A That's correct.

Q The whole structure and thickness of the fiberglass is a lot thinner today than it was even two, three, four, five years ago?

A That's correct.

Q You have never been to the Bertram factory, have you?

A No, sir.

[OBJECTION OVERRULED].

Q You never studied any Bertram manufacturer specifications, did you?

A No, sir, I haven't.

Q In fact you never had any experience with this type and this year of Bertram vessel before, did you?

A Not to the best of my recollection.

Q After you went directly to the vessel and the trailer, climbed up to the fender, did you then climb into the boat?

A After a few seconds pause looking

in the boat--the initial, visual contemplation of the deck area.

Q You never asked any questions of Mr. Zafra or of the other individual, did you?

A No, sir, I didn't.

Q The other individual was a Mr. Sanchez?

A That's correct. I believe so.

Q You observed the raised deck after you climbed to the fender of the trailer?

A That's correct.

Q The fender and the trailer would be about two and a half to three feet above the ground?

A I don't believe it would be quite that high. It would be---

Q Or pretty close to it?

A Maybe eighteen, twenty inches.

Q Prior to climbing aboard the trailer and viewing the deck of the vessel, you

were unable to see those portions of the vessel, were you not, from the ground level?

A That's correct.

Q It was absolutely necessary for you to climb up in order to get the proper vantage point to see in?

A That's correct.

Q After climbing up in that fashion and observing for a few seconds with a flashlight, you climbed aboard the vessel and got into the cockpit?

A That's correct.

Q You then flashed your light into the enclosed or walled off cabin?

A Yes, sir.

Q That is when you then got down on your hands and knees and commenced a close examination of the fibers of this indoor/outdoor carpet?

A That's correct.

Q Before climbing aboard the trailer, climbing aboard the boat, commencing the inspection of the carpet in a hand and knees fashion, pulling up the carpet, getting tools and unfastening the secret hatch, did you ever ask Mr. Zafra or Mr. Sanchez whether they had any articles aboard the boat which might be subject to the custom laws in the United States?

A No, sir, I didn't.

MR. CLAY: I have no further questions.

[REDIRECT AND RECROSS EXAMINATION OMITTED]

[DIRECT EXAMINATION: WITNESS, JAMES A. CARLIN].

THE COURT: Who is your next witness?

MS. TARG: Officer Carlin.

Thereupon:

JAMES A. CARLIN

was called as a witness and, having been

previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. TARG:

Q Officer, would you please state your name and official capacity for the record.

A James A. Carlin, Customs Patrol Officer assigned to the Miami District.

Q How long have you been so employed?

A A little over two years.

Q Prior to that time, what was your employment?

A I was a lieutenant with the Canal Zone Police in the Panama Canal zone.

Q For how many years?

A Thirteen.

Q Have you had any training in customs work?

A Well, due to my past experience as a police officer, I went to the advanced phase of the Custom School, which is in Glencoe, Georgia.

Q What kind of courses did you take there?

A Search and seizure, constitutional law, Miranda warnings, search of vessels and those types of customs-related tasks.

Q Turning your attention to October 10, 1980, had you started work that day or before?

A We started on the 9th at 6:00 p.m.

Q When you say, "we" to whom are you referring?

A Myself, Officer Nasossis and Officer Ogden.

Q What was your duty for that period which you were working?

A We're assigned to the marine section

on the night shift. So, basically we check boat ramps for any incoming vessels--the various boat ramps into the Miami area.

Q What is the purpose of checking the boat ramps for the waterways? What is the relationship to Customs?

A Well, we check basically for boats coming from foreign countries.

Boats coming into those ramps do have access to Customs waters. So, we check for documents and any undeclared items they might have.

Q What are Customs waters?

A Three miles out.

Q That night, turning your attention to October 10, did you see anything unusual?

A We noticed an older model pickup truck--I believe it was a 1971--at the Crandon Park boat ramp with a large

trailer on it.

We call it a Tandrum trailer. We call it a three axle, but it refers to three wheels on each side. So, it would be a six wheel trailer.

Normally these types of trailers do carry larger boats. So, we were sort of interested in this trailer.

Q Did you look at the truck which was there, too?

A Yes, ma'am.

Q Was there anything unusual about the truck, in your mind?

A Well, it was an older model truck.

In our experience with contraband or the smuggling of drugs, they go from one extreme to the other. They either have a pretty fancy truck, pretty fancy rig, or it seems they go to the other extreme and it's an older truck with a newer model trailer, of course.

Q Is that what you found that night?

A Yes, ma'am.

Q Did you ever see anybody approach that railer and truck?

A Yes, ma'am.

At approximately 3:10 a.m., on the 10th, a vessel came into the deck at Crandon Park and an individual did walk to the truck from the vessel.

Q What happened?

A The truck was backed up, the truck and trailer were backed down to the vehicle, at which time, give or take a few minutes, the Dade County Patrol Officer drove up in his vehicle and he went over to the vessel at the dock.

They were parked at a distance away, but apparently he was talking with the individuals and he started to walk away from the vessel on the dock there, at which time we drove up in our truck, got

out of the vehicle and approached the vessel.

Q Did you notice how much time it took for the people to tie up the boat to the trailer and hitch?

A I would say--you mean, to actually trailer it up and get it out of there?

Q Yes.

A Probably fifteen minutes.

Q Was there anything unusual about this, in your mind?

A They knew what they were doing.

In my experience of checking these ramps, it seems that a lot of the people seem to have a naturally hard time trailering their boats up. It's hard for them to line them up and get them on the trailer straight and everything else, and these gentlemen seemed to know what they were doing. They got it on rather rapidly and---

Q Was that suspicious to you?

A Well, it arose my suspicion because normally the people that do get involved in contraband seem to be more proficient at trailering a boat than the normal, everyday fisherman does.

Q Was there anything else about the boat or the people in it that arose your suspicions?

A There were only two people on board and---

Q What was suspicious to you about that?

A Normally a person who would be involved in with what we are involved in--contraband--that would involve two or three people on board.

Very seldom do you see a family or kids or anything of that nature on a boat that is involved with this type of thing. It's rare, anyway.

Q What did you do?

A As we approached in the vehicle, Officer Butchko, who was the Dade County man there, was sort of--I think he was getting ready to leave, and we identified ourselves as Customs Officers to him and we approached the vessel.

We informed the--well, I had what we call a Customs Raid jacket. It's a nylon windbreaker with the Customs Raid jacket. It's a nylon windbreaker with the Customs badge, you know, embossed on it, and on the back it says, "U.S. Customs" I think in two inch lettering. It has a Customs patch on each sleeve.

So, they more or less knew who we were, but we identified ourselves with our badge holder in the case and told them we were from U.S. Customs and that we would like to inspect their vessel and check their documents on the vessel.

Q What happened next?

I believe Mr. Zafra identified himself as the master of the vessel and he was asked for documents, I think, by--I believe Officer Nasossis who asked him for his documents in English, and I think I also asked him in Spanish, you know, to further clarify what we wanted.

At that time I returned to our vehicle to begin filling out a search and boarding form, which we routinely do in most cases involving Customs seizures.

MS. TARG: I have no further questions of this witness, Your Honor.

CROSS EXAMINATION

BY MR. CLAY:

Q Officer Carlin, as I understand it, you had a slipped disc or a back injury which kind of disabled you a little bit?

A Yes, sir.

Q Climbing in and out of the van was a little more difficult for you than it was for the other gentlemen with you?

A Right.

Q Did you lag behind when the three of you decided to get out of the Customs van?

A Right, plus I was driving the van so, by the time I secured it, put the brake on and everything else, they had already gone out.

I was probably a few steps behind them.

Q Is it not true that Customs Patrol Officer Ogden went directly to the trailer and boat, climbed onto the trailer and then climbed aboard the vessel?

A I believe there were a few preliminary questions first, but I'm sure Ogden was the first one on board.

He didn't actually just walk up and jump on per se, but he did go on shortly thereafter, after a few preliminary questions.

"We're from Customs. We want to check your documents."

Q Officer Ogden was already up on the trailer at the time you came up to Mr. Zafra and Officer Nasossis?

A I'm not sure. I don't think he got on quite that fast.

Q Are you guessing on this or do you know?

A I would say no.

Q You testified regarding the significance of this truck being an older truck. Correct?

A Yes, sir.

Q Would you not agree that the fact that this was an older truck is just as consistent with somebody who is an

innocent owner or user of the truck as it is with somebody who is a person who is criminally involved in the smuggling of contraband?

A Yes, sir.

We see lots of vehicles there that, just like you're saying, are not involved in this type of activity.

Q You would agree that there are probably more older trucks used by people innocently than there are used by people involved in smuggling, would you not?

A Sure. I'd have to say that.

Q Regarding the proficiency of these two men at trailering a boat, is it not true that this proficiency and the short period of time it took them to trailer the vessel in this case is just as consistent with a couple of men who were innocent, experienced boaters and fishermen?

Is that not true?

A Yes, but it's a proficiency seldom displayed on the ramps in South Florida by the average, everyday person.

For some reason, they have a hard time getting their boats on the trailer.

Q Mainly it depends on how many beers they have while they are out doing some boating?

A Could be.

Q The proficiency is just as consistent with an innocent man as with a smuggler?

A Yes, sir.

Q In the course of your duties, you observed many people who were out boating in the evening and fishing in the evening, did you not?

A Yes, sir.

Q Boats coming back to dock in the middle of the night or the early morning

hours is certainly not unusual for fishermen or boaters, is it?

A One thing that was unusual---

Q But my question is---

[OBJECTION OVERRULED].

Q My question is: Night fishing and night boating is not something unusual, is it?

A No, sir.

Q Would you describe your role in the case as a relatively minor one in light of the fact that you had a back injury?

A Yes.

Normally we take our turns in boarding vessels and getting directly involved but, because of the injury, I filled out the boarding form and the paperwork-type angle of it that night.

Q Would you not agree, sir, that there was nothing unusual about this particular 25 foot Bertram or the two

men, Zafra and Sanchez, prior to their being stopped, detained and the boat being boarded and searched?

A The only thing unusual about it--- it had been out for quite a long time.

We first observed it at about 8:00 p.m. on the 9th, and it came back at about 3:00 p.m. on the following morning.

That's quite a time lapse to be out in the bay itself. Normally you don't stay out for that many hours.

That's the only factor.

Q So, your answer would be that there was nothing unusual, other than the time lapse that the boat was out?

A No, sir. Yes, that would be my answer.

Q Obviously you have no knowledge whatsoever of whether the boat broke down or was out for that long a period

of time due to an engine breakdown, do you?

A No, I don't.

Q The fact that the boat was out of your sight for seven or eight hours is just as consistent with innocent fishing or an innocent, down on his luck boat owner whose boat breaks down out there on the bay?

A Yes, sir.

MR. CLAY: Nothing further.

[REDIRECT AND RECROSS EXAMINATION OMITTED].

[EXCERPT: ARGUMENT OF PROSECUTOR]
[1. Customs Search]
MS. TARG: I will argue that it was a Customs search and, in determining whether the search was good or not good, you just have to look at the federal law on searches and the federal law on boarding on vessels.

Customs authority 19 U.S.C. 1581A provides that Customs has a right to board any vessel in Customs water to ask for documents or other papers regarding the boat within twelve miles of the coast of the United States, and this boat was seen coming from the waters.

The officers testified that it was only a few miles outside the Atlantic Ocean. It was clearly in Customs waters.

* * *

[2. Articulable Suspicion]
The Court cases have held that, in deciding whether there is reasonable suspicion, a Customs Patrol Officer is

entitled to assess the facts in the light of their experience, and you must look at the totality of the circumstances.

We would, for those reasons, argue that the test to be given is: Did these CPO's, in their experience in the Customs Service, have articulable facts together with rational inferences from these facts to engender a reasonable suspicion that the vessel in this case was being used for narcotics trafficking and, again, we rely on those cases and on U.S. versus Brignoni-Ponce, a Supreme Court case cites at 95 Supreme Court 2574.

[EXCERPT OF STATE'S INITIAL BRIEF ON APPEAL TO FLORIDA 3d DCA]

B. Furthermore, the State would note that the officers did indeed have reasonable suspicion, based upon both their experience with smugglers and their observations, to board the vessel. See, United States v. Cortez, ___U.S.___, 101 S.Ct. 690 (1981); see, also, United States v. Mendenhall, ___U.S.___, 100 S.Ct. 1879, 64 L.Ed.2d 497 (1980) (approving use of profile characteristics); United States v. Forbicetta, 484 F.2d 645, 646 (5th Cir. 1973) (approving use of "profile" characteristics at border search). In Cortez the Court repeated its approval of an officer's use of his experience for probable cause and articulable suspicion thus:

> "The idea that an assessment of the whole picture yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment

> must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions --inferences and deductions that might well elude an untrained person." Emphasis added. 101 S.Ct. at 695.

Additionally, after the officers were on the vessel, they certainly acquired probable cause to search the hold from the presence and smell of marijuana on the deck. [Citations Omitted]. When the officers so clearly had probable cause to search the hold, the warrantless search was obviously justified by the exigency exception for vehicles and boats. See, Carroll v. United States, 267 U.S. 132, 54 S.Ct. 280, 69 L.Ed. 543 (1925), adopted by statute in Florida Statute §933.19. See also, Texas v. White, 423 U.S. 67,

96 S.Ct. 304, 46 L.Ed.2d 209 (1975); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 419 (1970); State v. Lopez, 369 So.2d 623 (Fla. 2d DCA 1979). In Chambers v. Maroney, the Court explained the exigency requirement thus:

> "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant (sic) is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater'. But which is the 'greater' and which the 'lesser' intrusion itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment". [Emphasis added] 399 U.S. at p. 51-52.

Undoubtedly the exigency exception to the warrant requirement was manifest in the

case at bar. The trial court's suppression of the evidence is therefore erroneous even under traditional search and seizure analysis and must be reversed.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1983
FRIDAY, OCTOBER 28, 1983

THE STATE OF FLORIDA, **
Appellant, **
vs. ** CASE NO. 81-474
SILVIO P. ZAFRA, **
Appellee. **

The cause is set for oral argument upon the mandate of the Supreme Court of the United States on Monday, December 12, 1983 at 10:30 o'clock A.M. with twenty (20) minutes being allowed each side to present oral argument. The parties may submit supplemental briefs twenty (20) days from date hereof.

IN THE DISTRICT COURT

OF APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1984

THE STATE OF FLORIDA, **

Appellant, **

vs. ** CASE NO. 81-474

SILVIO P. ZAFRA, **

Appellee. **

Opinion filed January 24, 1984.

An Appeal from the Circuit Court for Dade County, James R. Jorgenson, Judge.

Jim Smith, Attorney General, and Calvin L. Fox, Assistant Attorney General, for appellant.

Paul Morris; Rosen, Portela, Bronis, Angueira & Clay and William A. Clay, for appellee.

Before HUBBART, C.J. and BARKDULL AND SCHWARTZ, JJ.

On Mandate of Supreme Court of
the United States

PER CURIAM.

This cause is before us pursuant to the mandate of the Supreme Court of the United States in Florida v. Zafra, 462 U.S. ___, 103 S.Ct. 3529, 77 L.Ed.2d 1382 (1983), which vacated our decision in State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982), rev. denied, 418 So.2d 1281 (Fla. 1982), and remanded the cause "for further consideration in light of United States v. Villamonte-Marquez, 462 U.S. ———[,103 S.Ct.2573, 77 L.Ed.2d 22] (1983)." In that decision the Supreme Court held that U.S. Customs officials may, consistent with the Fourth Amendment, board a vessel located in waters having ready access to the open sea for the purpose of examining the manifest and other vessel documents under 19 U.S.C. § 1581(a) (1976),[1] without any reasonable suspicion of prior wrongdoing.[2]

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1. Footnote 2 to the opinion specifically states:

Section 1581(a) provides Customs officials with authority beyond boarding for document inspections. In this case, however, we are concerned only with the more narrow issue, United States v. Villamonte-Marquez, 462 U.S.at ____n.2, 103 S.Ct. at 2575 n.2.

(Footnote 2 on page A61)

We conclude that, for two reasons, Villamonte-Marquez is inapposite to the present case. First, the vessel involved was boarded while located on land atop a boat railer at the Crandon Park Marina in Miami. It was obviously not therefore in "waters offering ready access to the open sea," an essential requirement of the decision. See 462 U.S. at——, 103 S.Ct. at 2580, 77 L.Ed.2d at 31.

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2. The court at the outset of its opinion states:

Congress has provided that "[a]ny officer of the customs may at any time go on board of any vessel...at any place in the United States...and examine the manifest and other documents and papers...and to this end may hail and stop such vessel... and use all necessary force to compel compliance." 19 U.S.C. § 1581(a) (1976). We are asked to decide whether the Fourth Amendment is offended when Customs officials, acting pursuant to this statute and without any suspicion of wrongdoing, board for inspection of documents a vessel that is located in waters providing ready access to the open sea. United States v. Villamonte-Marquez, 462 U.S. at____, 103 S.Ct. at 2575 (footnotes omitted). The Court's decision answers this question in the negative.

Second, and probably more important, the boarding and subsequent search of this land-situated vessel was in no sense undertaken as a document inspection. As the eleventh circuit has recently, and we think correctly, stated in United States v. Herrera, 711 F.2d 1546 (11th Cir. 1983):

> In United States v. Villamonte-Marquez, ___ U.S. ___, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983), the Supreme Court held that no suspicion is necessary to stop and board a vessel that is located in waters providing ready access to the open sea to conduct a document inspection pursuant to 19 U.S.C. § 1581(a). The Court also made clear that Customs officers are not precluded from using document check authority simply because they suspect drug smuggling or other illegality on board, ___ U.S. at ___, n. 3, 103 S.Ct. at 2577 n. 3. However, nothing in that opinion suggests that reasonable suspicion is not required when the Customs officers' conduct, objectively assessed, indicates they did not stop and board the vessel to make a document inspection. [e.s.]

711 F.2d at 1554 n. 13. The emphasized observation plainly applies here. No one was even on the vessel at the time of the boarding; no effort was made by the Customs officer while aboard to inspect vessel documents or examine the manifest; and the entire search was for the admitted purpose of discovering whether marijuana was concealed on the vessel.[3]

(Footnote 3 on page A63)

Neither Villamonte-Marquez nor any other decision of the United States Supreme Court or the courts of Florida has ever authorized such a search without a prior showing of founded suspicion, one which the state concedes was not made in this case. See State v. Zafra, supra. Indeed, Villamonte-Marquez was careful to hold that the suspicionless stop of a vessel located in waters providing ready access to the open sea for a vessel document check, while constitutionally valid, did not thereafter authorize a general search of the vessel--as was conducted in this case--because the stop

> involves only a brief detention where officials come on board, visit public areas of the vessel, and inspect documents. "Neither the [vessel] nor its occupants are searched, and visual inspection of the [vessel] is limited to what can be seen without a search." (citations omitted)

462 U.S. at ___, 103 S.Ct. at 2581, 77 L.Ed.2d at 33.

For these reasons, we hold that our previous dicision is unaffected by Villamonte-Marquez. The order below is therefore again

Affirmed.

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3. See also, United States v. Whitmire, 595 F.2d 1303 (5th Cir.1979), in which Customs officers boarded a docked vessel after checking its documents ashore; in Herrera, the court stated that

> [i]n these circumstances, neither border crossing authority nor section 1581(a) document and safety check authority was available to render the boarding search reasonable under the fourth amendment.

711 F.2d at 1553.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
CASE NO. 81-474

THE STATE OF FLORIDA, **
Appellant, **
vs. ** MOTION FOR REHEARING
SILVIO P. ZAFRA, **
Appellee. **

COMES NOW, the Appellant, THE STATE OF FLORIDA, by and through its undersigned counsel and submits this Motion for Rehearing, to wit:

1. That on January 24, 1984, this Honorable Court again affirmed the judgment of the trial court below dismissing the present criminal charges upon the Defendant's Motion to Suppress. This cause had been previously reversed in Florida v. Zafra, 462 U.S.___, 103 S.Ct.

3529, 77 L.Ed. 2d 1382 (1983). In so ruling, this Court held that United States v. Villamonte-Marquez, 462 U.S. ___, 103 S.Ct. 2573, 77 L.Ed. 2d 22 (1983), permitting customs officers to board any vessel under Section 19 U.S.C. Section 1581(a) without articulable suspicion, was inapplicable to the present circumstance. Citing this Court's original opinion in State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982), this Court stated that the State had "conceded" that there was no articulable suspicion in the present case.

2. This Court's analysis that the State "conceded" that there is no articulable suspicion herein is based solely upon the wording of this Court's opinion in State v. Zafra, 408 o.2d, supra. As reflected in the excerpt to the State's original brief on appeal in this matter,

it states:

> "Furthermore, the State would note that the officers did indeed have reasonable suspicion, based upon their experience with smugglers and their observations, to board the vessel."

Brief of State at p. 14.

The undersigned has litigated this matter throughout on behalf of the State and the undersigned never conceded anywhere that there was no articulable suspicion in the present case. This is particularly so since the undersigned was aware that Florida v. Royer, 460 U.S.___, 103 S.Ct. 1319, 75 L.Ed. 2d 229 (1983), was pending at the time this present matter was being litigated and prepared for presentation to the United States Supreme Court. This Court's reference to any "concession" by the State should thereby be deleted.

3. The State submits that this Court has totally overlooked the fact that the

officers observed the boat in "customs waters" and boarded the boat within seconds after it had been removed from "customs waters" as it sat on a boat trailer on the boat ramp leading to "customs waters". Therefore, this Court's analysis that the boat was not in "customs waters" at the time it was boarded is not controlling nor dispositive of the present issues.

4. This Court's central position that the customs officers intended to board the boat because they suspected that it was carrying narcotics rather than boarding the boat to check "customs papers" is not accurate. First of all, the undisputed evidence below from the testifying officers established that Officer Nasossis checked the boat's papers. See T.16; T.41. Secondly, the officers boarded the boat because they decided to conduct a routine

customs boarding. T.16. The evidence in this regard is undisputed. Furthermore, this Court's foregoing analysis as to the intent of the officers is not relevant. See State v. Valdes, 423 So.2d 944 (Fla. 1982). In Valdes, the officer indicated that he conducted an "inventory search". The Valdes court rejected the statement of the officer's intent as controlling because the officer had lawful authority to conduct the search on other grounds. In United States v. Villamonte-Marquez, supra, 103 S.Ct. at 2577, N.3, the United States Supreme Court specifically rejected this Court's analysis, holding that the officer's subjective intent to seize narcotics from the vessel in Villamonte-Marquez, was not relevant inasmuch as the officers had lawful authority to board the boat in any event.

5. Finally, the State submits that the Customs Officers plainly had authority to search the vessel for narcotics under the specific terms of 19 U.S.C. 1581(a) and 21 U.S.C. § 955. This Court's limitation of the authority of Custom's Officers is therefore unlawful and contrary to Congressional intent.

WHEREFORE, upon the foregoing, the Appellant, THE STATE OF FLORIDA, prays that this Honorable Court will vacate its prior opinion in this matter and grant rehearing and upon rehearing will reverse the trial court's judgment granting the present motion to suppress.

RESPECTFULLY SUBMITTED on ths 8th day of February 1984, at Miami, Dade County, Florida.

Respectfully submitted,

JIM SMITH
Attorney General

(signed) Calvin L. Fox
Assistant Attorney General

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JANUARY TERM,A.D., 1984
WEDNESDAY, FEBRUARY 29, 1984

STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 81-474
SILVIO P. ZAFRA,	**	
Appellee.	**	

Upon consideration, appellant's motion for rehearing is hereby denied.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D., 1984
FRIDAY, MARCH 23, 1984

THE STATE OF FLORIDA **
Appellant, **
vs. ** CASE NO. 81-474
SILVIO P. ZAFRA, **
Appellee. **

The motion of appellant to stay the issuance of our mandate pending review by the Supreme Court of Florida of the order of judgment of this court entered herein on January 24, 1984 is granted pending entry of an order by the Supreme Court accepting or rejecting jurisdiction for review and for fifteen days thereafter; provided, however that this order so staying the mandate shall stand vacated without further order of this court in

the event proceedings to invoke such jurisdiction of the Supreme Court are not timely commenced, through failure of the movant to file notice thereof in this court as and within the time required by Fla.R.App.P. 9.120(b).

SUPREME COURT OF FLORIDA
THURSDAY, OCTOBER 18, 1984

STATE OF FLORIDA, :
CASE NO. 65,129
Petitioner, : District Court of Appeal 3d District
vs. : Case No. 81-474
SILVIO P. ZAFRA, :
Respondent. :

This cause having herefore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App.P. 9.330(d).

ADKINS, ALDERMAN, OVERTON, MCDONALD, and EHRLICH, J.J., Concur.
BOYD, C.J. and SHAW, J., dissent.

IN THE DISTRICT COURT

OF APPEAL OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D., 1984

TUESDAY, NOVEMBER 20, 1984

STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 81-474
SILVIO P. ZAFRA,	**	
Appellee	**	

Upon consideration, appellant's motion to stay the issuance of our mandate pending review of the Supreme Court of the United States is granted.